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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-276

TUNNEL BARREL AND DRUM CO., and
SABINO URCIOLI,

Petitioners,

vs.

HACKENSACK MEADOWLANDS DEVELOPMENT
COMMISSION and BOROUGH OF CARLSTADT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Jurisdiction

Petitioners assert jurisdiction on the basis of 28 U.S.C. §1257. However, respondent Hackensack Meadowlands Development Commission asserts that the court should deny the petition on the basis of lack of jurisdiction because same was filed out of time. The order of the Su-

preme Court of New Jersey denying petitioners' petition for certification was entered on May 17, 1977. The present petition was filed on August 17, 1977, which is more than ninety days after the denial of the petition for certification.

Question Presented

Did approval by the Hackensack Meadowlands Development Commission of a subdivision plan for replacement of a cul-de-sac by a through intersection, which replacement allegedly made access to petitioners' premises less convenient, constitute a taking of property for public use and entitle petitioners to compensation?

Counter-Statement of the Case

On September 6, 1968, petitioners acquired portions of Lots 56A-4 and 56A-5, Block 151 on the tax map of the Borough of Carlstadt, Bergen County, New Jersey. Petitioners allege that at the time of this purchase the only roadway leading from and to their premises was Triangle Boulevard, which ended in a closed cul-de-sac adjacent to its property. Subsequent to this purchase, a street known as Veteran's Boulevard was laid out running contiguous to petitioner's premises, perpendicular to Triangle Boulevard and adjacent to the closed cul-de-sac. Veteran's Boulevard was accepted as a public street by the Borough of Carlstadt on September 20, 1971.*

* The dedication and acceptance of Veteran's Boulevard is not the subject of this action. Respondent, Borough of Carlstadt, asserts that maps on file in the County Clerk's Office prior to 1968 indicate that the cul-de-sac was temporary and Veteran's Boulevard was dedicated as a proposed street.

On January 21, 1972, Kennilworth Associates (the owner of certain lands contiguous to those owned by petitioners) submitted a subdivision plan to the Hackensack Meadowlands Development Commission (the "Commission") to implement certain road intersection and related traffic safety improvements to minimize and/or eliminate dangerous conditions affecting vehicular and pedestrian traffic in the vicinity of Veteran's and Triangle Boulevards. Said subdivision plan was submitted to the Commission pursuant to N.J.S.A. 13:17-13 and 13:17-14 which empower the Commission to approve or dispprove subdivision plans and building permit applications. After discussions between the Borough of Carlstadt, Kennilworth Associates and the Commission, the Commission approved said subdivision plan on May 3, 1973. These plans have since been executed by Kennilworth Associates.

The subdivision plan accomplished two specific objectives. First, the plan eliminated the closed cul-de-sac and resulted in a road intersection for Veteran's and Triangle Boulevards.* The rationale for this improvement was that Triangle Boulevard exceeded the recommended maximum length for cul-de-sac streets under the Commission's subdivision regulations. N.J.A.C. 19:5-7.5(m). Second, the subdivision plan resulted in the construction of curbs in the area of the intersection to insure a continuous curb of approximately six inches in height within fifty feet of the intersection of Veteran's and Triangle Boulevards. This improvement is consistent with sound traffic engineering practices and furthers the safety of vehicular and pedestrian traffic at the intersection.

The improvements in question are not conducted on nor do they utilize any land owned by the petitioners. Fur-

* In fact, prior to construction of the intersection, vehicular traffic effectively destroyed the curb separating the cul-de-sac from Veteran's Boulevard and created a *de facto* intersection.

theremore, the improvements do not eliminate egress from and ingress to petitioners' premises. Petitioners had five curb cuts providing access to Veteran's and Triangle Boulevards, three along Veteran's Boulevard, each 18 feet in length, and two curb cuts along Triangle Boulevard, 36 and 24 feet in length respectively.* The improvements eliminated only one of these curb cuts, namely, the curb cut of approximately 24 feet in length along Triangle Boulevard.

Petitioners filed an inverse condemnation action against the present respondents in the Chancery Division of the Superior Court of New Jersey. That court granted defendants' motions for summary judgment (Pa1 to Pa6). The judgment of the Chancery Division was affirmed *per curiam* by the Appellate Division (Pa7 to Pa9). A petition for certification was denied by the New Jersey Supreme Court (Pa10) and the present petition followed.

*The Commission has measured these curb cuts with slightly different results. The Commission's figures show the three cuts on Veteran's Boulevard to be 20, 25 and 20 feet each and the two curb cuts along Triangle Boulevard to be 23 feet (the curb cut affected) and 37 feet. However, these minor discrepancies do not affect the fact that petitioners continue to have access to their premises.

ARGUMENT

POINT I

The Court should deny the petition for a writ of *certiorari* because the principles of law applicable to petitioners' allegation that construction of the intersection constituted a taking of property are clearly established, are not the subject of conflict in decisions, and were correctly applied by the Superior Court of New Jersey.

The question presented by this petition for writ of *certiorari* concerns the point at which changes in traffic patterns as a result of improvements to public roads become a taking for which the owner of adjoining land is entitled to compensation. More specifically, petitioners claim entitlement to compensation on the basis of construction of a through intersection where there had previously been a cul-de-sac, as well as the resultant claimed interference with truck access to petitioner's property. It is, however, uncontroverted that petitioners continue to have the use of four of the five curb cuts which served their property prior to construction of the intersection in question and petitioners admittedly have a means of ingress to and egress from their premises. This question is one which arises from the unusual factual circumstances noted above, and thus presents a narrow issue of law which is unlikely to recur, and which was properly decided by the New Jersey courts.

As long ago as 1878, in *Transportation Company* v. *Chicago,* 99 U.S. 635, this Court set forth the principles applicable to petitioners' claim that inference with their use of a public street constitutes a compensable taking of their property. In that case, the City of Chicago significantly reduced (albeit temporarily) a property owner's

land and water access to its premises. The interference with access resulted from the construction of a tunnel which would serve to continue a city street under the Chicago River; said tunnel, like the intersection construction at issue in the present petition, would further the movement of traffic along a public street. The court applied the constitutional prohibition against a taking for public use without just compensation to the facts just stated as follows:

> "* * * The decisons to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542 and notes. The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly* v. *Green Bay Company,* 13 Wall. 166, and in *Eaton* v. *Boston, Concord & Montreal Railroad Co.,* 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry

> was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient." 99 U.S. at 642.

Similarly, the Court held in *Gibson* v. *United States of America,* 166 U.S. 269 (1897), that interference with a property owner's access by water incidental to constructing a dam for improvement of navigation did not constitute a compensable taking. The improvement of motor vehicle transit involved in the instant matter is analagous to the navigational needs in *Gibson. See, Delaware River Commission* v. *Colburn,* 310 U.S. 419 (1940) (no requirement under interstate compact that property owner be compensated for limitation of access to public road due to bridge construction).

Lower federal courts have had no difficulty in applying the principles of *Gibson* v. *United States* and *Transportation Company* v. *Chicago,* and there has been no conflict of decision with respect to the issues raised herein. When the issue has been raised, the courts have consistently responded that a landowner is entitled to no more than reasonable access to and use of public roads and that no compensable taking occurs so long as the landowner is left with such access. *United States* v. *Certain Lands in the State of New Jersey,* 439 F.2d 670 (3rd Cir. 1971); *Winn* v. *United States,* 272 F.2d 282 (9th Cir. 1959);* *U. S.* v. *Certain Lands in the County of Cook, State of Minnesota,* 248 F. Supp. 681 (D. Minn. 1965); *United States* v. *Alderson,* 53 F. Supp. 528 (S.D. W. Va. 1944);

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* *Winn* v. *United States* held that inconvenience resulting from increased travel distance did not amount to a compensable taking. This holding is directly applicable to the inconvenience and expense which the present petitioners allege as the sole effect of the construction in question on use of their property (Pa5).

Johnson v. *United States,* 479 F.2d 1383 (Ct. Claims 1973).

The courts of New Jersey have reached similar conclusions. *Tubular Service Corporation* v. *Commissioner,* 40 N.J. 331 (1963), affirming 77 N.J. Super. 556 (App. Div. 1963); *State* v. *Interspace Corp.,* 130 N.J. Super. 322, 328 (App. Div. 1974); *State* v. *Monmouth Hills, Inc.,* 110 N.J. Super. 449 (App. Div. 1970); *State Highway Commissioner* v. *Kendall,* 107 N.J. Super. 248 (App. Div. 1969); *Mueller* v. *New Jersey Highway Authority,* 59 N.J. Super. 583 (App. Div. 1960); *State by Comm'r of Transportation* v. *Charles Investment Corp.,* 143 N.J. Super. 541 (Law Div. 1976). In *Mueller* v. *New Jersey Highway Authority,* supra, 59 N.J. Super. 583, 595 the court stated:

> "The general rule is that the property owner is not entitled to access to his land at every point between it and the highway but only to 'free and convenient access to his property and the improvements on it.'" Quoting *Iowa Highway Commission* v. *Smith,* 248 Iowa 869, 82 N.W. 2d 755 (Sup. Ct. 1957).

In addition to inconvenient access, petitioners allege the taking of a purported easement in the cul-de-sac which existed prior to the intersection construction. It is clear, however, that petitioners had no private property interest in said cul-de-sac.

While there may be private rights in the use of private rights of way, the only private right to the use of public street is one of access to the street. *Highway Holding Co.* v. *Yara Engineering Corp.,* 22 N.J. 119, 134-135 (1956); *United States* v. *Certain Lands in the State of New Jersey,* 439 F.2d 670, 673 (3rd Cir. 1971). There is no allegation in the instant matter that petitioners were

left "without any access whatsoever." *Highway Holding Co.* v. *Yara Engineering Corp., supra,* 22 N.J. at 136. The property rights which a transferee obtains in streets shown on a map referred to in a conveyance, *State* v. *East Shore, Inc.,* 131 N.J. Super. 300 (Ch. Div. 1974), are those rights defined in *Highway Holding Co.* Petitioners were not deprived of this right of access (Pa8).

In short, the principles governing petitioners' claim that construction of the intersection in question constituted a taking of their property are clearly established and were correctly applied by the Superior Court of New Jersey. Moreover, the question presented is a narrow one arising from unusual factual circumstances, and is unlikely to recur.

POINT II

The petition for a writ of *certiorari* should be denied because the petition was received by the Court after the period specified by 28 U.S.C. §2101.

It is a statutory requirement that application for a writ of *certiorari* to a state court in a civil matter be made within ninety days after the entry of the decree below. 28 U.S.C. §2101. In the present case, the application was made more than ninety days after the entry of the order of the New Jersey Supreme Court denying petitioners' petition for certification (Pa10). An application filed after the statutory period has elapsed should be denied for lack of jurisdiction. *Department of Banking of Nebraska* v. *Pink,* 317 U.S. 264 (1942); *Rust Land & Lumber Co.* v. *Jackson,* 250 U.S. 71 (1919).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of *certiorari* should be denied.

Respectfully, submitted,

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